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PRACTICAL SUGGESTIONS FOR DRAWING WILLS.¹

Every man who knows how to write thinks he knows how to write a will and long may this happy hallucination possess the minds of our lay brethren, for surely St. Ives, the patron Saint of lawyers, extends to none a heartier welcome in the life beyond than to the Jolly Testator who makes his own will.²

But with deference to the amateur lawyers, it is by no means easy to draw a proper will. Lord Coke said, in *Butler* and *Baker's* case³, a case argued 21 times, he

¹ This is an address delivered by Mr. Gest to the students of the Law Department on October 16th, 1907. The address was the opening lecture of the Auxiliary course in the Department of Law for the year 1907-08. The Auxiliary course is designed to give the students of the department an opportunity to acquire from eminent specialists information on many important subjects, which are either directly practical, or which tend to broaden their legal intellectual horizon. The lecture of Mr. Gest was designed for those members of the school who expect to practice in Pennsylvania, but the editors believe that the legal reader, in whatever jurisdiction he may happen to be, will find profit and amusement in the author's treatment of the subject.

² Sanctus Yvo erat Brito,
Advocatus et non latro
Res miranda populo.

³ 3 Rep. 36 a.

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being of counsel: "I find great doubts and controversies daily arise on devises made by last wills * * * in respect of obscure and insensible words and repugnant sentences, the will being made in haste, and some pretend that the testator in respect of extreme pain was not compos mentis and divers other scruples and questions are moved upon wills. But if you please to devise your lands by will, make it by good advice in your perfect memory and inform your counsel truly of the estates and tenures of your land and by God's grace the resolution of the Judges in this case will be a good direction to learned counsel to make your will according to law and thereby prevent questions and controversies."

For some three centuries this sound advice has been open to him who will read it and yet testators have such a reluctance to pay a fee to a lawyer, that they will draw their wills themselves, sometimes with the assistance of Dunlap, or have them, as Lord Coke says in the preface to the second volume of his Reports, "intricately, absurdly and repugnant set down by parsons, scriveners and such other imperites."

"Few men," says Lord Coke, again, "pinched with the messengers of death have a disposing memory." "Such a will," he adds, "is sometimes in haste and commonly by slender advice and is subject to so many questions in this eagle-eyed world. And it is some blemish or touch to a man well esteemed for his wisdom and discretion all his life, to leave a troubled estate behind him, amongst his wife, children or kindred, after his death."⁴

Sir Charles Butt of the Probate and Divorce Division, is quoted by G. W. E. Russell in his amusing book, Seeing and Hearing, as saying that though the aspect of human nature which is exhibited in Divorce, is not ideally beautiful, it is far less repulsive than that which is disclosed by Probate. Others more familiar with the Divorce Court will be able to judge of the correctness of the comparison, but it is certainly true that the settlement of estates affords an opportunity for the display

⁴ Preface to 10 Rep.

of all the mean, ignoble and hateful traits of human nature. This is sometimes unavoidable, but is frequently called forth by a foolish or badly drawn will. Says Byron:

"The lawyer and the critic but behold
The baser sides of literature and life
And nought remains unseen, but much untold
By those who scour those double vales of strife."

A will should, therefore, be made deliberately with sufficient time for consultation and revision. Few testators know their own mind, and a death bed will is as sorry a substitute for a carefully prepared instrument as a death bed repentance is for a well-ordered life. Yet it is astounding how frequently from indolence, procrastination or superstition, men will postpone this needful act until the last. Some, like old Euclio in Pope, with the ruling passion strong in death, cannot endure the thought of parting with their possessions even post mortem, and die intestate.

I have drawn a will in a hospital, while the surgeons were making ready in the next room to operate upon the testatrix, and found the situation did not tend to clarify the mind of client or counsel.

Nor is it always easy for a lawyer to draw a will. To do it aright, the draughtsman should know all the law on the subject, but he cannot carry Jarman, Theobald and Williams in his head, and, moreover, practical experience suggests a great many things which are not contained in the books. It may, therefore, be an assistance to some to give a few general hints upon the subject of some of the essentials which should be observed, and some of the more frequent errors which should be avoided; and even if you already know these suggestions, remember that " 'Tis the taught already who profit by teaching."

The uninstructed and inexperienced think it a very easy matter to set down their wishes in plain language, but the difficulty is double. First, there is the imperfect nature of the human mind. The layman or careless lawyer writes only from a particular standpoint, and considering only the probable or natural contingencies,

fails to provide for others. He assumes, for example, that his wife and children will survive him and die in order of seniority, the children leaving issue, whereas he should consider the effect of death, infancy or marriage of the beneficiaries under all possible combinations.

To cite a recent example. In *Carter's Estates*, the testator after a residuary trust for children for life, bequeathed the principal "to any widow, husband or children surviving any such child, in such proportions as are provided by the intestate law, and in default of such widow, husband or children, then to the brothers and sisters of such deceased child." A son died leaving a widow but no children, a contingency not expressly provided for, but which might have been foreseen.

Second: There is the imperfection of language itself to be considered. Words, the only method of expressing thought, may be ambiguous or uncertain in their meaning. To use them properly requires education and experience, and when technical terms are employed, as they must frequently be, an adequate knowledge of the art to which they belong, is necessary. If every testator had a clear idea of what he wanted to say and knew the precise meaning of the words which would convey that idea and no other, there would be no necessity for construction or interpretation, the object of which is to supply the deficiency of the written expression. But so often the ordinary meaning of the words leads to a result so foolish or unjust as to ground an inference that the real meaning of the testator has not been understood, that although the correct meaning of his words is clear enough, the meaning in which the testator used them is something different.

But the difficulty is to establish a rule of interpretation which shall be neither too rigid nor too flexible. To say that the intention of the testator is the pole star of construction, is merely to formulate the trouble without giving a remedy for it. The intention is to be sought primarily in the words, as the pole star in the sky, but

sometimes the pole star is so obscured in the clouds of words that it takes a skillful astronomer to see it.

Lord Eldon in construing a will as to which he said he had doubted for twenty years, said that in trying the meaning of phrases in the will, you may look at all the circumstances in which the Court might have been called upon to determine the meaning of the same phrases, applied to a different state of circumstances.⁶

Whether or not this be a correct method for the construction of wills, after they have gone into effect, it is very likely to be employed and it is, therefore, advisable for counsel to test his work by this canon.

Do not risk a catastrophe by running too near the edge, lest you may, unfortunately, pass it. "A surplus of caution does no harm, a want of it may spoil all." Follow, therefore, the approved forms and precedents, and do not try experiments at your client's risk. *Eventus varios res nova semper habet*, said Lord Coke.⁷ "A novelty invariably produces variable results"—and again he said, "It is safe for the Client and for the Counsellor also (if he respect his conscience) to follow Presidents formerly approved and allowed, and not to trust any new frame carved out of his own invention."⁸

As a will is the formal expression of the client's intention respecting his entire estate, the draughtsman should as a rule, be well informed as to all the conditions which surround his client. He should put himself in his client's place or, to use an expression of Lord Justice James, in *Boyes v. Cook*,⁹ place himself in his client's arm chair. He should, moreover, consider the contemplated will from the standpoint of the testator's family. How far counsel should endeavor to prevent the testator committing by his will any injustice, real or even apparent, towards his wife or children or others for whom he might, naturally, be expected to provide.

⁶ *Earl of Radnor v. Shafto*, 11 Ves. 457.

⁷ *Co. Litt.* 379 a—

⁸ *Co. Entries Preface*.

⁹ 14 Ch. D, 56.

is a question which cannot be readily answered, and the answer will often depend upon the closeness of the professional relation and the extent to which the client desires to be advised. But counsel should at least point out the probable effect of the will so that the testator may have full opportunity of considering his act.

Be careful, however, in advising, not to incur the risk of being accused of having made the will yourself like Dr. Johnson's friend Chambers, who drew a will for one of their common acquaintances. Said Johnson, "He believes he has made this will, but he did not make it; you, Chambers, made it for him. I trust you had more conscience than to make him say, 'being of sound understanding!' ha, ha, ha!" The idea amused Johnson so that, according to Boswell, he went into a convulsion of laughter, "and sent forth peals so loud that in the silence of the night his voice seemed to resound from Temple Bar to Fleet ditch."

Sometimes a testator to prevent litigation, will direct that any dispute as to the construction of the legal meaning of the Will shall be referred to his executor or other person named. This is an old practice and instances may be found in the wills printed in the Paston letters. Our Orphans' Court approved it in *Phillips' Estate*,¹⁰ but in view of other cases,¹¹ the question cannot be said to be clear, and it is much better to have all legal questions settled by the constituted authorities, who have no connection with the will or the family of the decedent and can act impartially.

Some counsel advise where an estate is left for the benefit of widow and children, that the widow shall be given a power of appointment among the children, as in this way her influence over them is preserved and she is enabled to make the final disposition of the estate suitable to their various needs at the time of her death. As Jarman points out, this has also the effect of preventing the children from disposing of their remainder in-

¹⁰ 28 W. N. C. 229.

¹¹ *Drennan's Estate* 33 Pitts. L. J. 338; *Reilly's Estate*, 200 Pa. 288.

terests. The advisability of the plan depends so much upon the conditions of each case, the ages and characters of the parties, the size of the estate and the needs of the children, that no general rule can be laid down. But if such a power is given, it is well to draw the power so that its exclusive nature shall be clear, that is, give the donee the unmistakable power to select certain from the class to the exclusion of the others. This will avoid such questions as were raised in *Neilson's Estate*,¹² and *Van Syckel's Estate*.¹³ Remember also that a power to appoint among children, cannot be executed in favor of grandchildren,¹⁴ and if the donee is intended to have the power to establish a trust, it is prudent to state it in terms, bearing in mind the rule against perpetuities.

In taking instructions for the will, it is a good plan to have the client write a preliminary draft himself, as a basis to work on. This is a great assistance to counsel and if the will should be contested, the holographic memorandum will often prove valuable as evidence. This memorandum may, if not too faulty, be signed as a temporary will, to the relief of the client's mind, for even if a man postpone making his will for ten years, he generally, when he consults counsel, wants it written over night.

If the testator is in active business, it is frequently necessary to direct how it shall be wound up or continued, and the executors should have power given to them corresponding with their duties and responsibilities. Perhaps the will should direct the incorporation of the business, on which point, consult the Act of April 22, 1889, § 1, P. L. 42. If the testator has partners, his partnership articles should be examined, as they may contain important provisions.

The mental condition of the testator, himself, should be carefully considered. Testamentary capacity is not always a simple matter to determine, but counsel should be satisfied with respect to it, aside from the natural

¹² 17 W. N. C. 326.

¹³ 9 D. R. 367.

¹⁴ *Horwitz v. Norris*, 49 Pa. 213.

presumption in favor of the testator's sanity arising from his judicious selection of counsel, for if the will is afterwards contested on the ground of incapacity, the draughtman will be called as a witness, and runs the risk of stultifying himself if the testator's lack of capacity appears. If the testator is ill, and under the care of a physician, it is sometimes advisable to consult with him and with the nurse in attendance and have doctor and nurse act as witnesses; remembering, however, that their non-professional opinions as to testamentary capacity are by no means final and should be received with caution.

One form of testamentary incapacity is especially noteworthy because its existence is sometimes hard to detect, namely a morbid delusion as to the character or conduct of wife or child or heir-at-law. Thus, in the leading case of *Dew v. Clarke*,¹⁵ the testator, a man of intelligence and education, thought his daughter was a child of the devil, and the special property of Satan, and treated her with great barbarity. From the evidence, it seemed quite clear that Satan was not an active factor in the problem, and the will which made an inadequate provision for a dutiful daughter, was set aside.

With this decision may be compared the case of *Thomas v. Carter*,¹⁶ which resembles it in several particulars. It must not be forgotten that under our law, a testator has and ought to have the right to prefer one child to another, and he may omit to provide altogether for his family, except so far as the law protects widow and after born children. He may if he chooses omit the traditional bequest of a shilling.¹⁷ It may sometimes be difficult to ascertain the testator's motives or how far he has been influenced by erroneous belief. "There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine."¹⁸

¹⁵ 3 Addams Ecc. 79.

¹⁶ 170 Pa. 272.

¹⁷ *Emernecker's Estate* 218 Pa. 369.

¹⁸ Lord Cranworth in *Boyse v. Rossborough*, 6 H. L. C. 45.

Fortunately for the majority of testators, no great degree of education or intellect is necessary, nor need they be in possession of all their senses. The law has been summed in these words:

"A person of sound and disposing mind and memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, and an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the objects of his bounty. It is not necessary that he should collect all these in one review. If he understands in detail all that he is about, and chooses with understanding and reason, between one disposition and another, it is sufficient. The question for determination is, were his mind and memory sufficiently sound to know and understand the business in which he was engaged at the time when he executed the will."

Those who have read the Count of Monte Christo, will remember how old Noirtier made his will. He could neither speak nor handle a pen, but could see and hear, and was accustomed to shut his eyes when he meant Yes, to wink when he meant, No. With the assistance of a dictionary, and their native intelligence, the notaries ascertained his wishes, wrote his will, read it in the presence of witnesses, and sealed it in accordance with the French law, which very conveniently, did not require the testator's signature.

Before the will is drafted, instruct your client carefully as to the intestate law, which will govern the disposition of his estate, in case no will were made, and ascertain to what extent his wishes are different, and do not fail to refresh your memory as to the intestate law in unusual cases of collateral kinship, for, as Lord Coke says, "No man can carry the words of a positive law by parliament in his head."

Under the intestate law in Pennsylvania, a wife, if there be issue, is entitled to one-third of the real estate for life and one-third of the personalty absolutely, and one-half in the same way if there be no children or issue; and the wife may take against the will the same part that she would be entitled to take, under the intestate law, if there be no will. A husband, on the other hand, takes under the intestate law, the real estate, as

tenant by the courtesy and a child's share only, of the wife's personality; and if there be no children or issue, the whole of the personality; but may take against the will, not what he would have taken under the intestate law, but either the part or share that his wife could take against his will, or his life estate in the realty as tenant by the courtesy.

Remember, also, that the entire scheme of the will may be dislocated by such election and, therefore, after the will is drawn, but before it is executed, consider the effect of the election upon each provision of the will under the different possible contingencies.

Sometimes it is desired to provide for the case of the remarriage of husband and wife, which has been known to happen, and in this case, it is well to guard against the event by clauses of limitation rather than condition.

Always inform a testator that his subsequent marriage will give his wife her legal rights in his estate, and a testatrix, that her marriage will revoke her will altogether, and that in either case, the subsequent birth of issue unprovided for in the will, will work a revocation *pro tanto*.¹⁹

Circumstances may arise where it may be permissible to prepare a will without having a personal interview with the testator, but this should rarely happen, especially as the go-between is very likely interested in the will. The conduct of a solicitor in such a case was severely criticized in *Rogers v. Pittis*,²⁰ and it hardly needs argument to show that for very many reasons a lawyer should be extremely careful when asked to draw such a will.

Another word of caution may not be out of place. Do not write a will for a stranger. Counsel should be thoroughly satisfied of the identity of the person whose

¹⁹ *Owens v. Haines*, 199 Pa. 137. As to what constitutes a sufficient provision, *Newlin's Estate*, 209 Pa. 456, and *Randall v. Dunlap* 218 Pa. 210 may be profitably consulted.

²⁰ 1 *Addams Ecc.* 47.

will be assumed to draw, and should require an introduction or identification.

A will should properly begin with the name and domicile of the testator. This is a very advisable precaution in the cases of those persons who, while regarding a certain city as their home, it may be because of their birth or former residence, or because of the location of their property, nevertheless may not have lived there for years. These citizens of the world spend their time in travelling abroad for the sake of health, recreation, business, the education of children &c, and like birds of passage, these social vagrants have no real home. It is, therefore, well to begin with a clause expressly stating that the testator has not abandoned his domicil and intends his will to be proved and his estate administered in a particular city.

Should the testator be actually domiciled in another state, where his will should be proved and estate administered, it is safer, unless the will is of the very simplest character, to submit the draft to local counsel for an opinion.

It was in olden times customary to begin a will with the words: In the name of God, Amen! and other pious phrases, relics of the period when it was a sin to die intestate, and a will was a religious duty, especially that part of it which bequeathed a goodly share of the estate to religious or charitable uses. Even at the present time, we occasionally meet with such a preliminary invocation, which generally means that the testator has copied the will from a form book, as did David Kelley of Wolf Creek, the hero of *Kelley v. Kelley*,²¹ whose will ran thus:

"In the name of God, I David Kelley, considering the uncertainty of this mortal life and Being of sound mind and memory blessed be almighty God for the same do make and publish this my last will and testament in manner and form following that is to say first I give and bequeath unto my) all my just debts and demands all my funeral and burying cost first Balance to Samuel Kelly Brother my Mother and John Montgomery to have their maintainance and burying charges out of it."

²¹ 25 Pa. 460.

The will can hardly be said to be without form, but the Supreme Court of Pennsylvania said it was void.

Next in order would formerly come a bequest of the testator's soul to God and of his body to the ground, often to be buried in a certain church.

There seems to have been a widespread primitive belief that the spirit of the departed could not rest in peace unless the obsequies were duly performed. Thus the ghost of Patroclus appeared to Achilles to request that his body might be buried in order that he might pass the gates of Hades. This belief was apparently fostered by the doctrine of the resurrection of the body and many of the medieval saints appeared at considerable personal or rather spiritual inconvenience after death, to give directions about the burial of their dead bodies. Piers Plowman in the 14th century, thus made his will:

"And I wish ere I wend, now to write out my will.
In God's name, amen! lo! I make it myself.
May God have my soul who hath saved and deserved it,
Let the kirk have my carrion and keep well my bones."

Lord Bacon in 1625, bequeathed both soul and body to God, while his name and memory he left to men's charitable speeches and to foreign nations and the next ages. Dr. Johnson's will in 1784, made a like disposition of his soul, but now-a-days people do not seem to care about their souls or their reputation, and, indeed, the practice is not to be encouraged. There is always some danger that the bequest may not be accepted and besides the State might endeavor to collect the collateral inheritance tax although it would be so difficult to appraise the value in many cases that the maxim *de minimis* would apply. Yet it is not improper, as the executor is charged with the duty of interment, for the testator to give directions for his funeral in his will.

The numerous wills contained in the Paston Letters, contain frequent and minute directions, for the interment of the testators' bodies. Shakespeare refers to this practice in King Richard II, Act III, Sc. 2, where Richard says:

“Let’s choose executors, and talk of wills:
And yet not so,—for what can we bequeath,
Save our deposed bodies to the ground?”

And again in Lucrece Shakespeare says

“This brief abridgment of my will I make,
My soul and body to the skies and ground.”

And again in King John Act IV Sc. 3

Arthur.—“O me! my uncle’s spirit is in these stones,
Heaven take my soul and England keep my bones.”

The Roman law permitted a testator to give directions concerning the interment of his body, and this seems reasonable, but the English Court of Chancery²² held that a testator could not require his body to be cremated, on the ground that there being no right of property in a dead body, it could not be disposed of by will. The Supreme Court of Pennsylvania, however, in an able opinion by the present Chief Justice, which indeed might be considered as a sort of Pretorian Edict upon the subject, goes far to establish as the rule in Pennsylvania that the wishes of the decedent, should be observed, except perhaps as against the wishes of a surviving husband or wife.²³

Even if the testator does not give any particular directions for his burial, it is well to remind him that he should provide a lot in some cemetery. It is the duty of an executor to bury the testator’s body and the matter does not permit much delay. Very frequently a bequest is made for the perpetual care of the lot, which under the Act of March 5, 1903, P. L. 12,²⁴ is free of collateral inheritance tax, but counsel should ascertain before the execution of the will, if possible, whether the amount provided is sufficient or, if unusual conditions are imposed, whether they will be accepted by the cemetery

²² *Williams v. Williams*, L. R. 20 Ch. Div. 659.

²³ *Pettigrew v. Pettigrew*, 207 Pa. 313, Cf. *Scott v. Riley*, 16 Phila. 106, *Fox v. Gordon*, 16 Phila. 185.

²⁴ *Middleton’s Estate*, 13 D. R. 811.

company or other trustee. In Pennsylvania such a bequest is saved from the operation of the rule against perpetuities by the Act of May 26, 1891, P. L. 119, but as this constitutes the bequest a charitable use, the Act of April 26, 1855, P. L. 328, probably applies, so that the will must be executed within a calendar month of the testator's death, and attested by two witnesses.²⁵ That the Pennsylvania legislature should consider the maintenance of a man's tombstone to be a charity is rather amusing. It would have been quite sufficient to say that the rule against perpetuities should not apply. Perhaps, however, the legislature had in mind the apostolic dictum that charity shall cover the multitude of sins, and thought that the turf and the tomb are also a charity which cover the multitude of sinners.

The desire of the testator for postmortem honors, is sometimes amusingly illustrated. I copy from an actual will these instructions: "I desire to be buried beneath the shadow of an obelisk, the style of which has been taken from ancient Egyptian civilization. I saw these wonderful monolith obelisks in Egypt, sat in their shade & sighed to have one for my monument in my far off home in the New World." On this obelisk the following inscription was directed to be placed:

"Young man! Stop & Think!
See what has been the reward for Honesty
Industry & Economy. In 1840 I worked on
Robert Martin's Farm near Jersey Shore for
25 cts. per day. No fortune left to me.
Lived and Died in the Faith of the Immutable
And unchangeable Laws of Nature and Nature's
God. Believed in the Gospel of Peace, Right
and Justice.
Travelled 60000 miles in America, Europe,
Asia and Africa."

The frequent direction to the executor to pay the just debts of the testator, is an interesting archaism, having its origin in the time when executors could not be sued upon the simple contract debts of the testator, though they were liable upon his bonds and obligations of a

²⁵ *Brabson's Estate*, 16 D. R. 670. *Church v Gifford* 5 C. C. 92.

higher nature. It thus became customary to provide for the payment of such debts and in fact it was regarded as a moral, if not a religious duty. Thus, in "Doctor and Student," published in 1518, the student remarks in Chapter XI of Dialogue 2—"It is better for the testator that his debts be paid wherefor his soul shall suffer pain, than that his legacies be performed wherefor he shall suffer no pain for the performing of them." So the form books early adopted such a provision, for example, West's *Symboleography*, Part I, § 645, gives this example: "I will that all such debts and duties as I owe of right or of conscience, to any person or persons be well and truly contented and payed by mine executors." In *Pinchon's Case*,²⁶ which held that executors could be sued upon a simple contract of the testator, it was said that the law intends that every man will in discharge of his conscience leave assets to pay all the debts which he ought to pay.

But no man in this 20th century need worry about the payment of his debts. The Orphans' Court will take very good care of that, provided he leaves a sufficient estate; and the direction to pay debts is superfluous and may well be omitted. Indeed it sometimes has produced serious and unexpected results where the testator is donee of a power.

Thus in Pennsylvania the mere exercise of a general power of appointment does not, as in England, make the estate passing under the power, assets ipso facto for the payment of debts.²⁷ But if the donee expresses the pious wish that his debts be paid and blends the trust estate with his own,²⁸ the debts of the donee will be thrown upon the trust estate, much to the disgust of the persons intended to be benefitted. The testator will be deemed to mean what he said when with an absolute power to do what he pleases, he directs that his debts be first paid. If, however, the donee,²⁹ though indicating his wish that debts be paid, provides no fund from which

²⁶ 9 Rep. 90 b.

²⁷ *Swaby's Appeal*, 14 W. N. C. 553; *Dunglison's Estate*, 201 Pa, 592.

²⁸ *Stokes's Estate*, 20 W. N. C. 48.

²⁹ *Fell's Estate*, 14 D. R. 326.

to pay them, and separately disposes of the trust estate, the creditors must take the will for the deed.³⁰

In many cases the testator desires to bequeath articles of clothing, jewelry and particularly household furniture, and it greatly facilitates the labors of the executor that such things should be specifically disposed of.

Dean Swift's will was unusually minute. Rich in beaver hats, he bequeathed the best to one friend, the second best to another, and the third best to still another, while he left to the Rev. John Grattan a silver box "in which I desire the said John to keep the tobacco he usually cheweth called pigtail."

It is often difficult to determine what is the legal signification of words which are commonly used very loosely. "Furniture," for example, comprises in general whatever contributes to the convenience of the householder or ornament of the house; but in *Hoopes' Appeal*,³¹ it was argued, though unsuccessfully, that where the testatrix kept a boarding school, the furniture used by the scholars was not fairly included, being rather articles of trade. According to the Roman law, the corresponding word, *supellex*, gave rise to similar disputes. But, in fact, all words must be construed with respect to the particular circumstances of the case. It might be supposed that where a man speaks in his will of any earthly property which he might own, he might be understood to include land, certainly of an earthly character. But the Pennsylvania Supreme Court in *Brown v. Dysinger*,³² decided that he did not. On the other hand, the same court held, in order to prevent an intestacy, that land passed by a bequest of "the remainder and residue of my money," *Jacobs' Estate*.³³ "Goods" is a comprehensive word. It may be useful to remember that according to the alphabetical list compiled by the learned Swinburne, Saffron Ships and Spaniels are all included within this elastic term.

³⁰ With these cases may be compared *Fisher's Estate* 16 D. R. 151, which seems to form a class by itself.

³¹ 60 Pa. 220.

³² 1 Rawle 408.

³³ 140 Pa. 274.

Now nothing in the settlement of estates is more likely to give occasion to family disputes than misunderstandings about such things. The 'goods' of the decedent indeed are often, instead of '*bona*,' rather '*mala*' of discord. Therefore, it behooves all making their wills, to provide carefully for "the merchandise of gold and silver and precious stones and of pearls and fine linen and purple and silk and scarlet and all sweet wood, and all manner vessels of ivory and all manner vessels of most precious wood and of brass and iron and marble." Even the Seer of Patmos has not made the catalogue exhaustive.

Such family disputes are indecent. Counsel should endeavor to calm them, and what is still better, to prevent their occurrence by a properly drawn will, for as Coke loves to observe,—*Praestat cautela quam medela*—Care is better than cure. So much depends upon the nature and number of these articles, the family conditions which surround the testator, &c. that it is impossible to be specific. Some testators, especially testatrices, like to leave what they call *memoranda*—which after their death are found to be loose, bungling scrawls, either so incoherent as to be useless, or else virtually codicils which have to be admitted to probate. The writing of such memoranda should be discouraged, except under advice of counsel. But I will dive no deeper into this point, as Coke says, but leave it to the further consideration of the learned reader.

Be sure that the subject of a specific bequest is accurately described and take to heart the lesson taught by the leading case of *Stradling v. Stiles*, in Scriblerus' Reports. This amusing travesty of the Elizabethan reporters, written in the degenerate Law French of the period, is included in the collected editions of both Pope and Swift, though written by neither. Its author was William Fortescue, a friend of both, sometime Master of the Rolls, to whom Bowles, the editor of Pope, paid the generous compliment that "he was, *though a lawyer*, a man of great humour, talents and integrity." In this

celebrated case the testator bequeathed to the plaintiff "all my black and white horses." Now the testator had six black horses, six white horses and six pyed horses, and the question was whether the pyed horses passed under the terms of the bequest. After elaborate argument, judgment was given for the plaintiff and then it was moved in arrest of judgment that the pyed horses were mares. Thereupon *curia advisari vult*, and I believe no final decision has ever been reported.

Frequently it is well to dispose of specific articles by a codicil which can be changed from time to time. In former times a codicil was said to be labelled or attached to a will, and Shakespeare seems to mean something like this in Twelfth Night, Act I, Sc. 5:

Viola. Lady you are the cruelest she alive,
If you will lead these graces to the grave,
And leave the world no copy.

Olivia. O, Sir, I will not be so hard hearted; I will give
out divers schedules of my beauty; It shall be
inventoried, and every particle and utensil la-
belled to my will; as, item, two lips indifferent
red: item, two gray eyes with lids to them: item,
one neck, one chin, and so forth.

A specific legacy is said to be adeemed when the thing bequeathed is given, sold, lost, destroyed, consumed, transformed or otherwise disposed of during the testator's lifetime, so that at his death it no longer exists. The legatee in such a case loses the legacy, which is especially disappointing as a specific legacy ranks as assets for the payment of debts above the mere bequest of a sum of money. It is well to point out this danger to the testator, and suggest a provision that if the thing given is so adeemed, or if in the case of bonds or mortgages &c, they be paid off during the testator's lifetime, or if a redeemable ground rent be extinguished, the value or proceeds shall be given to the legatee in lieu thereof, either as a general or preferred pecuniary legacy.

One word more about specific bequests of chattels. Avoid as far as possible life estates, for such articles are so subject to loss, deterioration, theft, or destruction by

even ordinary use, that the claims of the remainder men are often difficult of adjustment.

The bequests which generally come next are pecuniary legacies of money. Here the testator should be advised to consider their sum as compared with his entire estate. Some men, especially those whose property is invested in active business, have an exaggerated estimate of their wealth; others have vague ideas on the subject, and there is always danger of loss or depreciation of securities. Cases are not unknown where a testator of slender means has bequeathed in large legacies, an amount far greater than his estate,—perhaps by way of a practical joke, as the temporary joy of the legatees on hearing the terms of the will is inevitably followed by a powerful revulsion of feeling. Another danger should be considered. In old times a testator would very often bequeath in pecuniary legacies the bulk of his estate, intending to leave little for the residuary legatee, but now the residuary legatee is generally the chief object of the testator's bounty, so that any miscalculation of the amount of the estate, and all expenses, losses and depreciation fall upon the residuary estate. It is, therefore, well in many cases to give the favored legatee a pecuniary legacy, perhaps a preferred legacy, and then after the other pecuniary bequests, to leave him the residue.

Observe, also, in case of a pecuniary bequest in trust, that the trustee, unless authorized by the will, or given a sufficient power of investment, can only take cash and cannot accept securities unless they are legal investments such as he would be authorized by law to make.

If legacies of personal effects or small amounts of money, are given to minors, it is sometimes well to provide that the executor may deliver or pay them to the minors' parents for their use. This saves the necessity for the appointment of a guardian, and generally is satisfactory to the testator.

Where the estate is large, so that there is no danger from creditors and the payment of legacies may conveniently be made before the expiration of the year

allowed by law, it is well to authorize or to direct that the executors make prompt or even immediate payment, or to direct that interest shall be paid from the date of death, a provision which generally operates as a stimulus to the residuary legatee, and makes him see the hardship resulting to the pecuniary legatee in deferring payment. It is especially proper in many cases to provide for immediate payment in favor of widow and children, for their support pending the administration.

If any of the legatees have received money or other assets from the testator, he may wish to charge them therewith. Explain the difference between advancements, gifts and loans or debts, remember that advancements have strictly reference only to cases of intestacy: and do not overlook the question of interest.

Some testators like to provide annuities, often of small sums, paid monthly or even weekly. The practice is not to be recommended as such annuities must be capitalized according to the present practice, upon a low basis, generally 3%, for the executor or trustee must be protected, so that there is a risk on the other hand of an accumulation of income. While this exception to the statute against accumulations is permitted, the accumulation may sometimes constitute a source of embarrassment. It is therefore better to set aside a certain principal sum in trust for the beneficiary for life with remainder over. The calculation of the collateral inheritance tax on annuities is an additional complication to be avoided if possible.

The State imposes a collateral inheritance tax of 5% upon legacies or devises given absolutely to or in trust for all persons except father, mother, husband, wife, children or issue, and, as a graceful compliment to the ladies, son's wife or widow. The Act of April 22, 1905, P. L. 258, further excepts stepchildren. Why a son-in-law should not be favored as well as a daughter-in-law, and step parents as well as step children are questions which only the legislative mind can answer, and perhaps as a matter of public policy, legacies for charitable uses might also be exempted.

The testator should always be advised that this tax will be payable by the collateral legatee or devisee, unless the will directs its payment out of the residuary estate. In nine cases out of ten, the testator intends that the legatee shall receive his legacy in full and will so direct. So true is this, that the law might well provide as a rule of construction that this burden shall be borne by the residuary estate, unless the testator directs otherwise. The payment by annuitants of collateral tax out of their income frequently causes hardship. In exempting legacies from payment of tax, it is wise to make the provision general, and not mention the collateral inheritance tax specifically. During the operation of the United States legacy tax act of 1898, legacies though directed to be paid free of collateral inheritance tax, were necessarily subjected to Federal taxation.

Ordinarily legacies do not carry interest until the expiration of one year from the testator's death, when they become payable; but there are exceptions to this in cases where the law presumes that the testator intended interest to begin at his death. Such are annuities and also legacies in favor of minor children of the testator or those towards whom he is *in loco parentis* where the testator has not specially provided for their maintenance. In Pennsylvania another exception is made in the class of cases of which *Flickwir's Estate*,³⁴ is a well known example, where a sum of money was given in trust to pay the interest to one for life with remainder over. Here it is held that the life tenant is entitled to interest at 6% from the testator's death, on the ground that the gift was substantially equivalent to an annuity. It is extremely doubtful if this doctrine carries out the real intention of the testator in many instances, and these cases afford an example of the danger of artificial canons of construction. In view of the opinion of Judge Penrose in *Twells's Estate*,³⁵ and other cases, the only safe way is to state clearly in the will what is the testator's real intention.

³⁴ 136 Pa. 374.

³⁵ 11 D. R. 713.

If the testator desire to provide that a legatee who contests the will shall forfeit his legacy, be careful to insert a gift over, as otherwise the provision will be considered merely as in *terrorem*, having in mind that even then the forfeiture will not be operative if there should be held to be probable cause for the litigation.³⁶

One class of legacies deserves particular mention, those to charitable or religious uses. It is far better for people to give during their life time, when they can see and oversee, than to make posthumous benefactions. There was written, we are told, on a wall in St. Edmunds Church in Lombard Street, this inscription:—

**Man, the behovyth oft to have this in mind,
 That thou geve thy wylle thin hond, that sall thou fynd,
 For widowes be sloful, and chyldren beth unkynd,
 Executors beth covetous and keþ al that they fynd,
 If enybody eske where the deddys goodys becam,
 They answer
 So God me help and Halidam he died a poor man.**
 think
 on this.

Testators in making charitable bequests frequently commit great injustice or folly. Of course a man has the legal right to pass over his children or near relatives in favor of charity and religion, but in many cases he violates a moral duty in doing so. With this perhaps it may be said counsel has nothing to do, especially if his advice be not requested; but it often happens that from motives of vanity or perhaps sheer ignorance, a bequest is left, say for a charity which is totally inadequate either for its proper foundation or its subsequent support. It is in such a case at least proper to point out to the testator the inadvisability of the plan. Again the testator frequently imposes minute and particular directions or conditions which subsequent events show to be foolish or impossible. As Jeremy Taylor well says, we cannot discern what comes hereafter unless we had a

³⁶ *Friend's Estate*, 209 Pa. 442.

light from heaven brighter than the vision of an angel. No one ever drafted a plan for the administration of a charity, with greater care and exactness, than did Stephen Girard but his directions for the building of his college were promptly disregarded by the City, his trustee. It is often best to give what you give, outright and let the managers of the charity use it according to their best judgment, perhaps providing that the bequest shall be added to the invested funds of the institution; or, if trustees are necessary, let them be selected carefully and give them a free hand in administering their trust. The Act of June 25, 1885, P. L. 177, specially regulates the incorporation of certain charitable institutions under the provisions of wills, and a testator may if he chose give his executors wide discretionary powers in the selection of his beneficiaries.³⁷

Legacies and devises (and deeds and gifts as well) for charitable and religious purposes, are subject in Pennsylvania, to the Act of April 26, 1855, P. L. 328 § 11, and are invalid unless the will, attested by two credible witnesses, be made at least one calendar month before the decease of the testator. Observe the words *at least* one calendar month, for if the will is made say at 3 P. M., October 8th, and the testator dies on the following November 8, at 7 P. M., the charitable legacies are void.³⁸ February, you will observe, is the best month in the year for charitable testators to make their wills because it is the shortest, which seems rather absurd as the rule ought to be the same at all times of the year. If a legatee agrees with the testator, to pay the legacy to a charity, the act applies.³⁹ But the testator may make the bequest absolute in form and casually express the hope that the legatee will give it to the charity, or he may leave it absolutely to one who without making any agreement or undertaking any trust, would, know-

³⁷ *Dulles' Estate* 218 Pa. 162.

³⁸ *Gregg's Estate*, 213 Pa. 260. Compare *Wittmann's Estate*, 9 D. R. 47.

³⁹ *Carlile's Estate*, 3 D. R. 153.

ing the testator's desire, carry it out.⁴⁰ A method sometimes adopted is to leave a legacy to charity with a codicil providing that in case of the testator's death within a calendar month, the legacy shall be paid to a certain person. If the testator survives for the month, the codicil may be destroyed and even if it should not be destroyed, it would by its own terms, be void. If the testator dies within the month, his only reliance would be upon the honor of the legatee.

The other important requirement of the Act of 1855, is that a will containing legacies or devises for religious or charitable uses, must be "attested by two credible, and at the time, disinterested witnesses." Whether attested means subscribed or not,⁴¹ the only safe way is to have the witnesses sign their names in the presence of the testator and at his request. Who are disinterested witnesses is hard to say, but prudence dictates that no person should act who has anything at all to do with the charitable or religious legatee. The statute is a wise precaution against the exercise of undue influence while the testator nears his end, though in olden times the danger was more acute doubtless than now. It was then the duty apparently of the clergy to obtain a generous bequest. If you will borrow an Episcopal Prayer Book and turn to the Order for the Visitation of the Sick, you will see that it is made the duty of the ghostly visitor to admonish the sick person to make his will, and to declare his debts, what he oweth and what is owing to him, for the better discharging of his conscience and the quietness of his Executors, and it is added, the Minister shall not omit earnestly to move such sick persons as are of ability to be liberal to the poor.

Sometimes the value of disinterested witnesses has appealed to the ecclesiastical as well as the civil authorities. Thus Archbishop Ecgbert of York, in the eighth century, advises that the priest provide one or two witnesses besides himself, to the last words of the dying,

⁴⁰ *Schultz's Appeal*, 80 Pa. St. 396.

⁴¹ *Irvine's Appeal*, 206 Pa. 1; *Paxson's Estate*, 16 D. R. 269.

lest the relatives of the deceased, by reasons of avarice, deny the unsupported testimony of the clergy.

Finally, with regard to charitable legacies, devises or trusts, remember that if they are to take effect in foreign states or countries, or be administered by foreign trustees, the laws of those states should be consulted.

It is important, in cases of legacies to corporations, that the correct corporate title should be ascertained and inserted in the bequest, to avoid all uncertainty as to the testator's meaning. The books swarm with cases illustrating the value of this caution. A recent example is *Von Phul's Estate*,⁴² where a legacy was bequeathed to "The Northern Home for Friendless Children Forty first Street." There was a "Western Home for Poor Children" on 41st Street, while the "Northern Home for Friendless Children" was located on another street. If the legacy is given to an unincorporated society, describe it carefully and direct that payment should be made to its treasurer. And in general see that the legatees are properly named and if nick names are used, mention also the correct name of the legatee with some words of designation.

There has been so much litigation upon the subject of vested and contingent legacies, that it is hard to give suggestions other than the most obvious, if not trivial, on the subject, without going into details that belong to a formal treatise on wills. The general criterion is whether the contingency is annexed to the gift itself or merely to its payment. A bequest to A at 21, and a bequest to A, payable at 21, do not differ greatly in expression, but the first is probably contingent and the second is vested. It is always easy to ascertain the testator's definite meaning, and it can then be stated explicitly that the legacy is intended to be contingent until the happening of a certain event, and not to vest before it happens. The law leans in favor of vested legacies, but testators often like to make them contingent. One great advantage is that it gives the legatee

⁴² 14 D. R. 277.

something to live for, and to those entitled in case of his death, something pleasant to think about. It is important to observe what disposition is made of the income, what the object of the testator is in postponing payment, whether there is a gift over in the event of death before payment, and what is the relation between the testator and the beneficiary.

It is in like manner difficult to give in a few words any really helpful suggestions as to Class legacies. The essential characteristics of the Class idea seem to be:

1. Equality. Class members share alike.
2. Unity. The whole gift takes effect or fails altogether, and all the class members are ascertained at one time.
3. Uncertainty. The ultimate number of the class is uncertain when the gift is made.

Words of survivorship are frequently used and generally in an ambiguous way, for to survive may mean to survive the testator, or to survive one or more of the class; or, in some cases, some other event. It is a general rule of construction that words of survivorship in bequests of personalty as well as devises of realty, in Pennsylvania, *prima facie*, refer to the death of the testator and not, according to the English decisions, to the death of a tenant for life.⁴³ It is, therefore, important to state clearly when the class is to be determined and if words of survivorship are used, to what date they refer and in necessary cases, what disposition is to be made of income that accrues when the class is not in being.

In devising real estate, the property should be described with sufficient accuracy to prevent error or confusion. The testator should always be asked if he owns real estate in other states or foreign countries, and the will should be executed in accordance with the foreign law. Some states require a publication of the will; some, as Georgia, Maine and Connecticut, following the old English statute, require three witnesses; some provide for an express *rogatio testium*. In devising a

⁴³ *Sterling's Estate*, 24 W. N. C. 495.

fee, words of inheritance are generally inserted although unnecessary under the Act of April 8, 1833, Section 8, P. L. 249. This is a wise conservatism; it is easy to insert them and the testator's intent more clearly appears.

A devise of real estate does not include an insurance policy which, of course, is personal estate. The testator will very often wish to give the policy to the devisee, if his attention is called to the matter. In case of the devise of real estate which is subject to a mortgage made by a prior owner, the devisee takes the property subject to the incumbrance,⁴⁴ but if the testator himself made the mortgage to secure his own bond, the devisee is entitled to have the mortgage paid by the general estate.⁴⁵

It is sometimes well to make a specific disposition of a cemetery lot, which is a peculiar kind of property.

In *Holbrook's Estate*,⁴⁶ the widow elected to take against the will and of course was entitled, there being no children, to one-half of the real estate for life. Included in the estate were some cemetery lots, and the question was, what interest did the widow take in them. If they were real estate, she had but a life estate in a thing for which apparently she had no pressing need, as she would have to die in order to enjoy it, and at that moment her interest would cease. The lots were sold by the executor, and the Court held that they were real estate, so that the widow had a life estate in one-half of the fund.

The residuary clause of the will carries with it everything that is not previously devised and bequeathed. Generally it blends real and personal estate together and this may have an effect not contemplated. Thus, legacies are charged thereby on the land, even if the testator left sufficient personalty to pay them, or if the residuary gift to charity is void, under the act of 1855.

⁴⁴ *Hirst's Appeal*, 92 Pa. 491.

⁴⁵ *Stuard's Estate*, 17 Phila. 498; *Burton's Estate*, 3 D. R. 755.

⁴⁶ 1 D. R. 269.

So too the blending of real and personal estate sometimes is held to imply an equitable conversion of the real estate.

Do not allow a testator to confuse his will by making his residuary clause include another residuary clause, leaving, in other words, a residue of a residue. A little attention to his real intention will obviate any seeming necessity, and avoid much confusion.

A lapse in the residuary clause does not, generally speaking, enure to the other residuary legatees. There is an intestacy and the heirs and next of kin are entitled. The effect of the death of a residuary legatee should, therefore, be considered and provided for.

It is often well and generally very well, to give special powers to executors and trustees, beyond those conferred by the general law. Executors should be given an express power to sell the personal estate at private sale. As a practical matter, executors generally assume that they have this right, but it is not safe to sell the assets of the decedent except at public sale, at least the burden of proof would be on the executor to show the bona fides and the wisdom of his course.

It is customary to give the executor power to sell real estate. Great care should be taken in drawing these powers, to avoid a conversion unless a conversion is really intended,⁴⁷ and counsel should bear in mind the consequences of a conversion into personal estate with respect to the devolution of the estate, especially as the conversion will date, as a rule, from the decease of the testator,⁴⁸ instead of the date of the sale as in case of a discretionary power.⁴⁹

If the testator owns real estate in other states, the effect of an equitable conversion may be to subject it to Collateral Inheritance tax in this State and as the conversion may not only be caused by an explicit direction to sell, but also by a blending of realty and personality

⁴⁷ See remarks of Justice Mitchell in *Yerkes v. Yerkes*, 200 Pa. 419.

⁴⁸ *Doflein's Estate*, 16 D. R. 173.

⁴⁹ *Holmes, Estate*, 15 D. R. 774.

in the will or by the necessity of a sale in order to carry out the provisions of the will, as *e. g.*, to pay legacies, great care should be exercised.⁵⁰

In drawing a power of sale to be exercised by executors, care should be taken to indicate the purpose for which and the time within which it should be executed. A power without limit is bad under the rule against perpetuities and it will, therefore, be presumed to be limited to the purposes of the will which, of course, is a question of the testator's intention. It is, therefore, well in the frequent case of a life estate in the realty, with a power of sale in the executor, to let it clearly appear whether the power is intended to last only during the life estate or continue thereafter for purposes of division.⁵¹

Unless special powers of investment are given to a trustee, he is restricted to mortgages, public loans, ground rents &c, under the Acts of Assembly. It is customary to enlarge the powers of a trustee, and the client should be consulted carefully as to their extent. If he has vague ideas on the subject, the responsibility will be thrown on counsel, who is supposed to be familiar with the administration of trusts, and this calls for discretion under all the circumstances of the case. Sometimes a very full power is advisable, sometimes it should be restricted to certain classes of securities. The testator will frequently desire his trustee, or at least authorize him to retain investments belonging to the estate.

Very frequently a trust is made for the benefit of a class of persons, children, for example, for their several lives, with remainders to issue, with or without powers of testamentary appointment, and with contingent cross remainders over. It is generally better to separate the trusts and provide separately for each individual of the class. It lengthens the will, but tends to accuracy. In

⁵⁰ In connection with *Vanuxem's Estate*, 212 Pa. 315 and *Dalrymple's Estate*, 215 Pa. 367, the learned article by Judge Penrose in 62 Leg. Int. 435, should be considered.

⁵¹ *Wilkinson v. Buist*, 124 Pa. 253; *Potts v. Breneman*, 182 Pa. 295; *Githens's Estate*, 9 D. R. 465; *Eberly v. Koller*, 209 Pa. 298.

this connection, it is well to avoid giving vested interests in income *pur autre vie*.⁵²

In drawing a testamentary trust, be careful to see that the language used indicates more than mere desire, recommendation, expectation or confidence. Let there be no room for doubt that a trust is really intended.⁵³

Trusts in Pennsylvania are of three kinds.⁵⁴ We shall say a few words about each, and first of separate use trusts for married women. These can only be made for a married woman or for a woman in actual (as distinguished from theoretical) contemplation of marriage, that is in other words, engaged to be married to a certain man. It seems to be settled in Pennsylvania that a man cannot provide for the protection of a daughter against a possible improvident marriage unless, she being actually engaged, he aims the caution directly against her intended husband.⁵⁵

The question is important, for a separate use trust, under which the married woman has no powers whatever except those given by the will, need not impose active duties on the trustee, and moreover, is terminated by discovery. It is therefore in most cases advisable to provide an active trust in addition, where the nature of the future interests permit it.⁵⁶

The doctrine of spendthrift trusts has been carried to an extreme in Pennsylvania and in *Stambaugh's Estate*,⁵⁷ the Supreme Court went so far as to hold the trust to be a spendthrift trust as between trustee and cestui que trust for the sole reason apparently that the cestui que trust was insolvent. Mr. J. C. Gray in his learned treatise on Restraints on the Alienation of Property, combated the Pennsylvania cases with vigor, and with such success

⁵² *Rowland's Estate*, 151 Pa. 25.

⁵³ *Bowlby v. Thunder*, 105 Pa. 173.

⁵⁴ Perhaps *Springs Estate*, 216 Pa. 534 makes a fourth.

⁵⁵ *Quin's Estate*, 144 Pa. 444, despite a strong dissent in the lower Court by Penrose J. 27 W. N. C. 473. Cf. *Hildeburn's Estate* 27 W. N. C. 471.

⁵⁶ *Denis' Estate*, 201 Pa. 616.

⁵⁷ 135 Pa. 585.

that by the time his book reached a second edition, all of the important States in the Union had followed our example. This is not the place to discuss the question of public policy. It is right that he who cannot manage his own estate, shall be protected by a trust; but the observation may be permitted that in *Board of Charities v. Lockard*,⁵⁸ the Court went to the very limit in permitting a cestui que trust to enjoy his income without any responsibility for his wife and children. The decision was correct, but should be corrected by legislation.

The subject of trusts for the protection of future interests, is too vast to be discussed in detail. A caution is necessary as to the failure to provide for an ultimate remainder over in case of the failure of the designated beneficiaries; or in case of a remainder limited directly to heirs. An intestacy thus caused, dates from the death of the testator and by reason of the probable death of his children or next of kin pending the trust, the actual distribution is apt to be very different from that contemplated by the testator.⁵⁹ It is frequently well to direct that in such case the heirs or next of kin should be ascertained, as though the testator had died at the termination of the life estates.

Every limitation in a will must be considered in the light of the Rule against Perpetuities, which is not a rule of construction but intended to strike down every testamentary intention obnoxious to it. It is a rule founded upon public policy and necessity. As Pope says,

"The laws of God as well as of the land
Forbid a perpetuity to stand."

A limitation which violates the rule, is altogether void, not merely for the excess, therein differing from the Statute against accumulations. The rule should receive special consideration in drawing trusts under a power in another will or deed, for the appointment by the donee

⁵⁸ 198 Pa. 572.

⁵⁹ *Boyd's Estate*, 199 Pa. 487.

is read back into and in a sense becomes part of the instrument creating the power.⁶⁰

The danger of directing a perpetuity is especially great in class legacies, for if the limitation is void as to one member of the class, it is void altogether.⁶¹

Accumulations of income are prohibited under the Act of April 18, 1853, § 9, P. L. 503, copied in great measure from the English Thellusson Act. Under this Act an accumulation of income is forbidden, except during the minority of the beneficiary. The accumulations are unfortunately not permitted by our law to be capitalized in trust, but must be paid over to the cestui que trust upon his arrival at majority, which is often the worst thing that could happen to him. Every trust should, therefore, be tested by the Statute—remembering however that the prohibition does not apply to a reasonable accumulation for contingent expenses, repairs or losses, or the better protection of a spendthrift cestui que trust against possible deficiencies of income.⁶²

When personal property is given to one for life, with remainder over, the life tenant may be required to enter security for the protection of the subsequent interests,⁶³ but the testator may desire to provide that this security shall not be required, and the law should be explained to him.

In drawing remainders after life estates, counsel should always bear in mind the rule in Shelley's Case, and ascertain whether the testator really intends to vest a fee in the first taker or not. Appropriate words of limitation or purchase should then be used. It will frequently be found that the testator actually intends to devise a fee. This is not the place to discuss the policy or the meaning of this celebrated and much maligned rule, but those who do not fully understand it would do well to read the clear explanation of it by Mr. S. H. Thomas,

⁶⁰ *Lawrence's Estate*, 136 Pa. 354. *Boyd's Estate*, 199 Pa. 487.

⁶¹ *Coggins's Appeal*, 124 Pa. 10.

⁶² *Eberly's Estate*, 110 Pa. 95. The doctrine of this case, however, should be followed with great caution.

⁶³ Act May 17, 1871 P. L. 269. Act April 17, 1869. P. L. 70.

and its vigorous defence by Judge Penrose and Judge Thayer, in the *Legal Intelligencer* for 1899, pp. 17, 38 and 83.

If the testator has minor, unmarried children, he may appoint a testamentary guardian for them under the Statute of 12 Charles II. c. 24 § 8 & 9, in force in Pennsylvania.⁶⁴ The powers of a testamentary guardian are very large. His authority is derived from the will, without the entry of security, and not from the Orphans' Court, though he is subject to its control. He is entitled to receive and hold all personal property and the rents of real estate belonging to the minors, whether derived from the father's estate or elsewhere. His right to the custody of the children is exclusive, even it has been held, but not recently, as against the mother.⁶⁵

As the appointment of a testamentary guardian cannot be superseded by the election of a minor child on reaching the age of 14, and his powers are so extensive, it behooves a testator to be very careful in making a selection of a guardian. The office is one of peculiar delicacy and difficulty, but if the guardian be wisely chosen, he may be of incalculable benefit to his ward.

A codicil should never be written unless the draughtsman has the original will or an exact, reliable copy before him. The recollection of the testator is often faulty and the codicil may conflict in an unexpected manner with the provisions of the original will. Some testators are afflicted with a passion for writing codicils, so after these paper writings accumulate, it is well to redraw the whole and make a consolidated will, though if the testator is very old or infirm, so that the noble army of relatives are on the alert to contest the will, it is better to retain the old will, written at a time when the testator's capacity was unimpeachable.

⁶⁴ *Roberts' Digest* 312, as qualified by the Act of April 8, 1833, § 4, P. L. 249.

⁶⁵ *Commonwealth v. Hamilton* 1 Pitts. 412—The right of a mother to appoint a testamentary guardian, is given by the Acts of June 10. 1881. P. L. 96 and May 25, 1887 P. L. 264 and is much narrower,

While the cacoethes testamentaria is common to both sexes, the ladies are the worst offenders.

“Testators are good, but a feeling more tender,
Springs up when I think of the feminine gender,
‘Tisn’t easy to say ‘mid her varying vapors,
What scraps should be deemed testamentary papers.”⁶⁶

A recent example of the danger of adding a codicil instead of rewriting the will, may be seen in *Norris’ Estate*.⁶⁷ The testator having about four million dollars, and two sisters, left among a number of pecuniary legacies, two hundred thousand dollars to each sister and bequeathed the residuary estate to them equally. One sister died leaving issue, whose rights under the Act of 1844, were confirmed by a codicil. Upon the death of the other sister, the testator made a codicil in which he bequeathed to certain relatives, “the *legacy* which I have left to my sister.” The question was whether this little word *legacy* meant only the trifling bequest of two hundred thousand dollars, or the residuary bequest also.

A codicil is also a convenient method of making numerous bequests of personal property, as it may be changed from time to time without disturbing the peace of mind of the goodly fellowship of the legatees. A man who is given ten thousand dollars by the will and is cut down to five thousand dollars by a codicil, does not appreciate what he gets. He thinks a great deal more about the money he lost than that which he gains.

So also it is often well to appoint executors by a codicil which can be destroyed, and a new one written. The revocation of the appointment by a codicil often appears as a reflection upon the testator’s first choice.

There are certain rules established by Statute to carry out the presumed intention of the testator, saving to him, however, the right to direct otherwise. The attention of the testator should therefore in proper cases, be drawn to these acts.

⁶⁶ From the Jolly Testator who makes his own Will. 11 *Am. Law. Record* 125.

⁶⁷ No. 3, 217 Pa. 560.

The Act of April 8, 1833, § 12, P. L. 250, provides that no devise or legacy in favor of a child or lineal descendant, shall lapse or become void by reason of the decease of the devisee or legatee in the life time of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue.

The Act of May 6, 1844, § 2, P. L. 565 provides that no devise or legacy in favor of a brother or sister or the children of a *deceased* brother or sister of the testator, such testator not leaving any lineal descendants, shall lapse or become void by reason of the decease of such devisee or legatee in the life time of the testator, if such devisee or legatee shall leave issue surviving the testator, but such devise or legacy shall be good and available in favor of such surviving issue.

This Act was amended by the Act of July 12, 1897, P. L. 256, which was construed in *Harrison's Estate*.⁶⁸ As was pointed out in that case, one object of this Act was to change the law as it had been determined in *Gross's Estate*,⁶⁹ and apply the principle of the Act of 1844 to class legacies. Another object was to bring within its operation legacies to children of any brother or sister of the testator, by striking out the word "deceased" from the phrase "children of a *deceased* brother or sister of the testator." No apparent reason suggests itself why the act is not as necessary or beneficial in one case as another, and a case of great hardship which occurred under the old act of 1844, suggested this amendment to the writer.

The Act of June 4, 1879, P. L. 88 is modelled after the English statute of 7 Wm. IV. & I Vict. c. 26. It provides:

1st. That every will shall in reference to the property comprised in it, speak and take effect as if it had been executed immediately before the death of the testator.

2nd. That lapsed and void devises of real estate shall fall into the residuary estate.

⁶⁸ 18 Pa. S. C. 588; 202 Pa. 335.

⁶⁹ 10 Pa. 360.

3rd. That a general devise or legacy shall operate as an execution of a general power of appointment.

And the Act of July 9, 1897, P. L. 213, provides that the words 'die without issue' or 'die without leaving issue' or 'have no issue' &c, shall be construed to mean want or failure of issue in the lifetime or at the death of the person, and not indefinite failure of his issue unless a contrary intention appear.⁷⁰

It is well to observe caution in the use of certain familiar but ambiguous words and phrases.

Do not say 'family' or 'relations' or 'friends.' They are too vague and mean little or nothing. Do not use the word 'heirs' unless you really mean 'heirs,' and do not confuse 'heirs,' 'issue' and 'children.' Do not say, 'have children,' if you mean 'leave children.' Do not forget that 'children' very seldom includes grandchildren,⁷¹ and do not leave a legacy to next of kin unless you state when the next of kin are to be ascertained, and let it clearly appear whether husband and wife are intended to take as heirs or next to kin.⁷²

The tiny word 'and' often means 'or' and 'or' is sometimes disjunctive and sometimes explanatory, sometimes used to connect two things intended to be the same, and sometimes things radically different. "That blessed word survivors," as Theobald says, "so grateful to the lawyer's ears, is one of the most dangerous to the testator. It hardly ever means 'others.' " Consider whether the period of survivorship is the death of the testator or the time of distribution, and do not overlook the contingency that those who do not "survive" may leave issue who are unprovided for.⁷³

In will making, as in everything else, you will learn by your mistakes, but never make the same mistake twice, or copy another's blunders. In justice to your

⁷⁰ This act has been recently construed in *Siegwarth's Estate* 33 Pa. S. C. 622.

⁷¹ *Field's Estate*, 16 D. R. 589.

⁷² *Doflein's Estate* 16 D. R. 173.

⁷³ Upon this point see, *Sterling's Estate*, 24 W. N. C. 495 and *Norris's Estate* No. 1, 217 Pa. 548.

client, you must exercise a little originality and ingenuity and besides you will learn more by making fresh errors than by the vain repetition of old ones.

Sometimes a testator will desire to insert in his will remarks reflecting upon the character or personality of some person who has injured him or incurred his displeasure; he should be carefully advised that he runs the risk of subjecting his estate to a claim for damages, as for a libel on the part of the injured person. Such cases are, of course, rare, but that the possibility exists is shown by *Gallagher's estate*.⁷⁴

The will generally concludes with the appointment of executors, a most important thing in itself, and indeed under the old law the instrument was not, strictly speaking, a will without it. Under the law of Pennsylvania, an executor appointed by the will, if a resident of this state, does not have to enter security, so that it is worth while to make a will simply to save the trouble and expense of administration. Sometimes the testator makes a foolish choice of his executors. A woman is often useless, but so are very many men and after all the lawyer has to do nearly all the real work. Whether a partner is a suitable person depends largely upon the partnership articles, but he is generally, on account of his adverse interest, an improper choice. A non resident of the State must, as observed, enter security, and in large estates this is expensive and troublesome. A trust company is in these days frequently selected, and being generally financially responsible and always immortal, is, if its officers know their business, a good choice. A proper pride in our profession, forces from us the ad-

⁷⁴ D. R. 733 Kirbys Eccentric Museum reports such a will of one John Aylett Stow proved in June 1781. "I hereby direct my executor to lay out five guineas in the purchase of a picture of the Viper biting the benevolent hand of the person who saved him from perishing in the snow and present it to Edward Bearcroft whereby he may have frequent opportunities of contemplating on it and be able to form a certain judgment which is best and most profitable, a grateful remembrance of past friendship and almost parental regard or ingratitude and insolence. This I direct to be presented to him in lieu of a legacy of three thousand pounds I had left him in a former will now revoked and burnt."

mission that the testator might do much worse than to select a member of the Bar. If the testator owns property in another state, another executor may be appointed to act therein, and it is often wise to appoint a substituted executor or executors or trustees to act in case of the death, discharge or resignation of the original appointee.

The Statute says 'Every will shall be in writing.⁷⁵ But how shall the writing be made, and upon what material? Here is room for variety. A brilliant author wrote a story in which a will was tattooed on a man's back, and a recent novelist conceived the idea of branding a will, in paragraphs, on a number of horses and cows, much to the embarrassment of the probate judge when the living document was offered for probate. But in real life, some testators seem to try to propound conundrums for the Court. A will scribbled on a slate, has been held not to be within the spirit of the Statute.⁷⁶ But a will may be written in pencil.⁷⁷ I knew a connoisseur who wrote a codicil on a blank check, and a will was recently admitted to probate, which was written on a visiting card.⁷⁸ Mrs. Eliza Jane Gaston⁷⁹ wrote her will in pencil on an old gas bill or circular. In *Fouche's Estate*,⁸⁰ the will was written on the blank page of a printed notice. The will in *Patterson v. English*⁸¹, consisted of six disconnected items written in pencil, in a small almanac and memorandum book, entitled Merchant's Account Book and Buyer's Guide. Lord Clyde wrote a codicil on club paper, giving Thackeray a theme for one of his Roundabout papers and Lord Grimthrope wrote three of his fourteen codicils on the backs of an old letter, a dinner invitation and a circular.

⁷⁵ Act of April 8, 1833 § 6, P. L. 249.

⁷⁶ *Reed v. Woodward*, 11 Phila. 541; *Woodward's Will*, 1 W. C. N. 177.

⁷⁷ *Myers v. Vanderbilt*, 84 Pa. 510.

⁷⁸ *Harres' Will*, Public Ledger, July 4, 1907.

⁷⁹ *Gaston's Estate*, 188 Pa. 374.

⁸⁰ 147 Pa. 395.

⁸¹ 71 Pa. 454.

But these are Practical Suggestions. Be advised therefore and adhere to the time-honored though humble materials of good white paper and black ink, unless you prefer typewriting, which has the authority of the Act of June 18, 1895, P. L. 209.

But every will need not be in writing. Personal estate may be bequeathed by an oral or nuncupative will, made in the last illness of the testator, under certain special conditions, and a further exception is made in the cases of soldiers in actual military service and sailors at sea.

And the will must "be signed by the testator at the end thereof or by some person in his presence and by his express direction." In *Wineland's Estate*,⁸² the testator signed the will, but after his signature was a clause appointing executors, which had been written as a part of the will. This he did not sign, and the Supreme Court held that the appointment of executors was a part of the will and therefore the testator had not signed at the end thereof, so that the whole will was invalid.⁸³ When the Pope speaks *ex cathedra* on matters of faith his word is law, so when the Justices of our highest Court speak as it were *ex banco supremo* their decision must be accepted without demur but in the fulness of time let us hope that *Wineland's Appeal*, which led to great injustice, will be overruled by the Court or corrected by the Legislature.

The Statute, however, says that the will "unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction." The structure of this sentence invites rather than repels criticism and it is not clear whether the will of a testator, who is *not* prevented by the extremity of his last sickness, may not be signed by

⁸² 118 Pa. 37.

⁸³ With this compare *Saunders v. Samarreg Co.* 205 Pa. 632, where the clause appointing executors had been added after the will above had been signed, and *Baird's Estate*, 3 D. R. 514.

some other person in the manner prescribed.⁸⁴ but as a practical matter, the cases hold that the testator must sign if he can do so safely, and if he cannot, he must ask some one to sign for him, and this person may either sign his own or the testator's name,⁸⁵ and if he is prevented by the extremity of his illness from making this request, the unsigned paper may yet be valid as a will.⁸⁶

It is recommended that the testator sign each page of the will, particularly if it be typewritten. This is a safeguard against fraud and it generally pleases the testator to write his name so often. Before the testator executes his will, read it over to him or have him read it over. Insist on this, even if the testator thinks he has something more important to do, for he has not. Number the different clauses of the will. This will assist the Court to refer to the ambiguous parts in the subsequent litigation.

Sealing is of course not necessary, but it is advisable, as some powers should be executed under seal. While almost anything will do for a seal, it is well to avoid such a question as was raised in *Hacker's Appeal*,⁸⁷ a case of the execution of a power, where a mere dash did duty for a seal. Add a red wafer. It does no harm, is inexpensive, and pleases the esthetic eye.

The will under our law need not be witnessed, except, as before mentioned, in the case of charitable bequests, where the Statute uses the word "attested." But it is better to have the two witnesses required to prove the will, present at its execution and subscribe it. They should be informed what they are doing and intelligent enough to understand it, and should be persons whose own signatures may be easily proved if they should die. They may be called to testify as to the testator's sanity and their mere opinion is evidence. Conversely, they are competent to prove the testator's mental weakness,

⁸⁴ *Vernon v. Kirk*, 30 Pa. 218;

⁸⁵ *Baldwin's Estate*, 17 Phila. 458.

⁸⁶ *Showers v. Showers*, 27 Pa. 485; *Smith v. Beales* 33 Pa. S. C. 570.

⁸⁷ 121 Pa. 185.

but in doing so, they proclaim their own.⁸⁸ A legatee or an executor may act as a witness⁸⁹ but they had better not. Although two witnesses are enough, yet it is generally better to have three, not that there is any especial luck in odd numbers, but because one at least of the witnesses may forget his implied covenant to survive the testator, or the testator may have land in a state where three witnesses are required.

And for the relief of a tender conscience, the testator may be advised that the execution of a will on Sunday is as lawful as a game of baseball, provided of course, that no breach of the peace be committed.⁹⁰

In ancient Rome a will was often made in duplicate so as to guard against loss or fraudulent suppression, and Lord Coke in *Butler* and *Baker's case*,⁹¹ seems to recommend something of this sort. The idea was ingenious, but a case is noted in the Digest, where the two copies, not having been made on a typewriter, did not agree, one giving a legacy of 100 gold pieces and the other only 50. Proculus, the Roman jurist, held in favor of the heir, that the legatee took only the smaller sum. A reference to the English cases in Theobald will show some of the other complications which may ensue and upon the whole, as a rule, it is better to make one will and deposit it in a safe place which in modern times is not hard to find, although the sagacity of the ordinary testator sometimes fails him here. The Golden Dustman in *Our Mutual Friend* used to bury his wills in the ash heap and his very last will was concealed in what was called a 'Dutch bottle.' Last wills in novels, are often found in secret drawers, hidden behind old portraits, tucked away in Bibles or other books seldom opened and just at the last minute, spring out to con-

⁸⁸ *Hampton v. Garland*, 2 Hayw. 147; *Kirby's Estate*, 9 Kulp 345.

⁸⁹ *Patterson v. Shrader*, 12 W. N. C. 429.

⁹⁰ *Commonwealth v. Myers*, 8 C. C. 435; *Beitenmann's Appeal*, 55 Pa., 183, though the Supreme Court cautiously added for the benefit of the profession, that "the business of writing a will is another matter which we need to say nothing about."

⁹¹ 3 Rep. 36 a.

found the wicked heir—and bring riches and happiness to the lovely heroine. Of course, ladies have their own opinions as to the proper place to keep their wills. Moved by the Idol of her Tribe, Mrs. Eliza Jane Gaston concealed her will in her top bureau drawer, which induced the comment of Mr. Justice Dean, "in what particular or inappropriate place an elderly lady or, for that matter, a young one, will put articles or writings of value, is hard to even guess."⁹²

And now, having written the will and given it to your client with a caution to keep it safely, and with the customary wish that it may be many years before it goes into effect, dismiss the testator with your ben-diction and your bill.

John Marshall Gest.

⁹² *Gaston's Estate* 188 Pa. 374.